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STATE OF ALASKA

THE LOCAL BOUNDARY COMMISSION

Before Commissioners: Darroll Hargraves, Chair
Georgianna Zimmerle
Robert Harcharek
Anthony Nakazawa

UPON REMAND: *IN THE MATTER OF THE*)
MARCH 20, 2000, PETITION BY THE CITY)
OF HOMER FOR ANNEXATION OF)
APPROXIMATELY 25.64 SQUARE MILES)
_____)

STATEMENT OF DECISION

SECTION I
SUMMARY OF PROCEEDINGS

On March 20, 2000, the City of Homer (City) petitioned the Local Bound-
ary Commission (LBC or Commission) for annexation of an estimated 25.64 square
miles. Over the following twenty-one months, the proposal was addressed at great
length.

The level of written responsive comment on the proposal was unparal-
leled for any city annexation proceeding in Alaska.¹ The City responded to those
comments in a formal reply brief. The Department of Commerce, Community, and
Economic Development (Department),² as staff to the Commission, then reviewed the
entire written record (City's Petition, responsive briefs, public comments, and the City's
Reply Brief) and conducted its own research and analysis.

Following such, LBC Staff published a 412-page Preliminary Report with
recommendations to the LBC regarding the matter (*Preliminary Report Regarding the*

¹During the initial opportunity for written comment on the matter, 14 responsive briefs compris-
ing 751 pages (including exhibits) were filed with the LBC. The 14 respondents were: Alaskans Op-
posed to Annexation (AOA); Doris Cabana; Sallie Dodd-Butters, Abigail Fuller; May Griswold, Vi Jerrel,
Ph.D.; Kachemak Area Coalition, Inc., d/b/a Citizens Concerned About Annexation (CCAA); Kenai
Peninsula Borough (KPB); Objective Annexation Review; Peter Roberts; Steve and Margret Seelye, Bill
Smith, Crossman Ridge Neighborhood; and Raven Ridge Homeowners Association. Additionally,
168 responsive letters were submitted. In this proceeding, respondent CCAA has also been referred to
as "Kachemak Area Coalition, Inc."

²"The Department" is the Department of Commerce, Community, and Economic Development,
formerly known as the Department of Community and Economic Development and formerly known as
the Department of Community and Regional Affairs.

1 *City of Homer's Proposal for Annexation of an Estimated 25.64 Square Miles*
2 [Annexation Preliminary Report]). The Annexation Preliminary Report was widely
3 circulated for public review and comment. Thirty-two sets of comments on the
4 Annexation Preliminary Report were submitted. After considering those comments,
5 LBC Staff published its Final Report on the matter.

6
7 In December 2001, the LBC traveled to Homer. Touring by helicopter
8 and automobile, the Commission spent several hours inspecting the territory proposed
9 for annexation. After the inspection, the LBC held a two-day public hearing in Homer.
10 Over the course of the hearing, 91 summaries, opening statements, testimonies,
11 comments, and closing statements were presented to the Commission. Following the
12 conclusion of the hearing, the LBC deliberated in open session for approximately
13 two hours regarding the proposal.

14
15 Based on the application of evidence to the applicable standards formally
16 established in law, the LBC determined that annexation was warranted, albeit for a
17 territory substantially smaller than that sought by the City. The Commission
18 determined that the legal standards were best met at that time by limiting annexation
19 to 4.58 square miles. The LBC amended the City's Petition to reduce the size of the
20 territory and then approved the amended Petition.³

21
22 Six individuals or groups asked the Commission to reconsider its deci-
23 sion. The Commission met to address those requests. The LBC concluded that none
24 of the requests provided a basis for it to reconsider the matter. Consequently, all re-
25 quests were denied.⁴

26
27 On January 23, 2002, the Commission submitted the amended annexa-
28 tion proposal to the Alaska Legislature for its review under Article X, section 12 of the
29 Constitution of the State of Alaska.⁵ What followed was a level of review by the Leg-
30 islatre at the committee level that far exceeded the customary careful consideration

31
32 ³The Commission's actions occurred on December 21, 2001.

33 ⁴January 17, 2002.

34 ⁵Article X, Section 12 states, in relevant part, that the Commission, ". . . may present proposed changes to the legislature during the first ten days of any regular session. The change shall become effective forty-five days after presentation or at the end of the session, whichever is earlier, unless disapproved by a resolution concurred in by a majority of the members of each house."

1 of LBC boundary proposals.⁶ Ultimately, the Legislature tacitly approved the Commis-
2 sion's proposed boundary change on March 9, 2002, by not rejecting the proposal
3 within the time allowed under Article X, section 12. Annexation took effect on
4 March 20, 2002, pursuant to 3 AAC 110.630, following the requisite Voting Rights Act⁷
5 review by the U.S. Department of Justice.

6
7 The Commission's decision was subsequently appealed to Superior
8 Court. The Court affirmed all aspects of the Commission's decision except one. The
9 Court concluded that, "the LBC erred when it failed to consider the impact annexation
10 would have on [the Kachemak Emergency Service Area (KESA)]." *Kachemak Area*
11 *Coalition v. City of Homer*, 3 AN-02-0426 CI (Alaska, December 4, 2003), p. 22. The
12 Court remanded the City's amended annexation petition to the Commission to discuss
13 the impact of the March 20, 2002, annexation on KESA.

14
15 The Alaska Department of Law and the City requested that the Court re-
16 consider its decision. The Superior Court denied those requests.

17 Because the action taken by the Superior Court in this proceeding does
18 not constitute final judgment, there was no automatic right to appeal. Alaska Rule of
19 Appellate Procedure 402(b)(2) states, "Review is not a matter of right, but will be
20 granted only where the sound policy behind the rule requiring appeals to be taken only
21 from final judgments is outweighed"

22
23 As a matter of clarity, KESA is a new service area of the Kenai Peninsula
24 Borough (KPB or Borough)⁸ created shortly after the City filed its annexation petition.
25 The original boundaries of KESA encompassed an estimated 218.69 square miles,

26
27 ⁶The Community and Regional Affairs (CRA) Committee of each house is the standing com-
28 mittee that has jurisdiction over proposals by the Commission for municipal boundary changes subject
29 to legislative review. At the time, both the Chair of the five-member Senate CRA Committee and one of
30 the seven members of the House CRA Committee represented the territory within the boundaries of the
31 City of Homer and the territory petitioned for annexation. The Senate and House CRA Committees met
32 jointly regarding the annexation proposal on three occasions for a total of nearly seven hours. The
33 House CRA Committee met on one additional instance regarding the proposed annexation for approxi-
34 mately 1.5 hours. Legislative review of the annexation proposal, in effect, ended when the House CRA
Committee rejected a motion on a 6-1 vote to pass out of the Committee a resolution vetoing the an-
nexation. The House CRA Committee Chair from Aniak cast the lone dissenting vote.

⁷42 U.S.C. 1973c.

⁸As discussed in more detail in the Commission Staff's remand reports, a petition to create
KESA was initiated, in accordance with the provisions of KPB Ordinance 16.04.010, in April 2000; ap-
proved by the KPB in August 2000; and approved by voters in October 2000.

1 overlapping all but 0.26 square miles petitioned for annexation.⁹ The KPB added that
2 0.26 square miles of territory to KESA's boundaries after the Commission's amend-
3 ment and approval of the City's annexation petition.

4 The basis for the Court's opinion that the LBC erred when it failed to
5 consider the impact annexation would have on KESA is outlined on pages 19 – 23 of
6 the Court's December 4, 2003, order. The Court noted at 19:

8 [The appellants] contend that Homer essentially "cherry-picked" KESA.
9 The annexation took a large percentage of KESA's population but left a
10 majority of its territory – over 175 square miles. Thus, KESA was left in a
predicament in which it had a greatly reduced tax-base yet remained al-

11 Further, the Court observed at 20:

12 Appellees in the present case [the Commission and the City] admit to es-
13 sentially dismissing any impact the Homer annexation would have on
14 KESA, yet at the same time they claim the issue was discussed as much
15 as the situation warranted. The stated reason for the inattention is that
16 the LBC and Homer maintain that KESA was formed illegally and thus did
17 not deserve serious consideration. Regardless of the motives of those
18 who petitioned to form KESA, KESA was created and will continue to ex-
ist even if Homer annexes a portion of it. This court must assume that
the remaining service area is legitimate and will be responsible after an-
nexation for providing services within its new boundaries (citations omit-
ted).

19 The Court stated further at 21-22:

20 This Court accepts as true that Homer and the Kenai Peninsula Borough
21 agreed to an amicable transfer of assets. However, given the amount of
22 attention focused on KESA from even before its inception, this Court
23 finds the lack of consideration given to the effect annexation would have
24 on KESA troubling. Mentioning KESA in passing, or in connection with
25 the additional burdens the City planned to take on is not the same as a
26 discussion about the impact annexation would have in view of whether
the annexation was in the best interests of the state. Clearly, annexation
of the entire service area was not in the state's best interests, as the LBC
did not approve even the entire 25+ square miles for which Homer origi-
nally petitioned.

27 Because it was impossible for the City to include a transition plan for
28 KESA at the time of its petition (since it did not yet exist), a discussion of
29 the effect annexation would have on surrounding services [*sic*] areas,
30 was warranted to ensure that the annexation was indeed in the best in-
31 terests of the state. There is no evidence that any such discussion ever
32 occurred. Thus, a remand is appropriate to ensure that the LBC consid-
33 ers this issue (citations omitted).

34 ⁹The 0.26 square-mile territory is known as Millers Landing. That territory was apparently inad-
vertently excluded from KESA originally. Notwithstanding the exclusion, voters in Millers Landing had
voted on the question of authorizing the Borough to exercise powers within the original boundaries of
KESA.

1 No member of the Commission as currently constituted was a member of
2 the Commission when the original petition came before it. On December 8, 2003, the
3 current Commission Chair was notified by Bob Hicks, a current member of the Com-
4 mission, that he had potential conflicts of interest with respect to the remanded
5 amended Homer annexation petition. After consulting with the State Attorney Gen-
6 eral's office, the Commission Chair concurred with Commissioner Hicks that the po-
7 tential conflicts raised warranted recusal of Commissioner Hicks with respect to
8 matters pertaining to the Homer annexation remand.

10 On May 18, 2004, the Commission adopted procedures for this remand
11 proceeding. That *Order on Remand* was served on all parties of record and their re-
12 spective counsel. Copies were also distributed to potentially interested individuals and
13 groups. It was also posted on the Commission's Web site at
14 http://www.commerce.state.ak.us/dca/lbc/homer_annex_remand.htm ("Homer Re-
15 mand Web site") and continues to remain there for public review.¹⁰

17 Procedures outlined in the *Order on Remand* were developed under
18 authority of 3 AAC 110.660. The *Order* limited evidence to that dated or events occur-
19 ring on or before January 17, 2002 (the date on which the Commission denied re-
20 quests for reconsideration of its December 26, 2001, decision). The *Order* advised
21 that the provisions of 3 AAC 110.500 prohibiting *ex parte* contact with the Commission
22 applied to this remand proceeding.

24 Among other things, the *Order* established the following procedural
25 schedule for the conduct of the proceeding:

- 26 1. June 24, 2004 - deadline for written comments concerning
27 KESA and the effect on KESA of the annexation of
28 4.58 square miles to the City (based on evidence dated or
events occurring on or before January 17, 2002);
- 29 2. July 15, 2004 - deadline for City to file reply in response to
30 timely filed comments;
- 31 3. August 12, 2004 - deadline for LBC Staff to file preliminary re-
32 port on remand;

34 ¹⁰All documents posted to the Homer Remand site, as discussed herein, remain on that site for public review.

4. September 2, 2004 - deadline for City, the 14 respondents, and public to comment pertaining to the preliminary report on remand;
5. September 23, 2004 - deadline for LBC Staff to file final written report on remand;
6. Public hearing to be scheduled at least three weeks following mailing of the final report on remand; and
7. Fourteen days prior to hearing, deadline for City and respondents to file lists of witnesses.

In accordance with the *Order on Remand*, LBC Staff issued public notice of the opportunity to comment on the issue of KESA and the Homer annexation (*Notice of Remand*). It was published in the *Homer Tribune* on May 26, 2004, and in the *Homer News* on May 27, 2004.

On May 21, 2004, LBC Staff mailed the *Notice of Remand* to the City; each of the respondents in the original Homer annexation proceeding; the former members of the LBC who participated in the original Homer annexation proceeding; and the respective legal counsel for: the Commission; City; Alaskan's [sic] Opposed to Annexation, *et al.*; CCAA; and Abigail Fuller. On that date, LBC Staff also submitted a request for a public service announcement (PSA) regarding the opportunity to comment regarding KESA and the Homer Annexation. The PSA request was submitted to radio stations listed in *Alaska Media Directory – 03* as serving the Kenai Peninsula (i.e., KBBI-AM; KDLL-FM; KGTL-AM; KKIS-FM; KPEN-FM; KSLD-AM; KSRM-AM; KWHQ-FM; KWVV-FM; and KXBA-FM) and requested that it be announced for 14 days following receipt of the request.

On May 24, 2004, LBC Staff posted the *Notice of Remand* on the *Alaska Online Public Notice System* (AS 44.62.175) and arranged for the *Notice of Remand* to be posted on the Commission's Web site, *supra*, under "Homer Annexation Remand" to be listed in the "Quick Links" directory. Further, LBC Staff arranged for the City to post the *Notice of Remand* in three prominent locations (Homer Public Library, Homer Harbormaster's Office, and Homer City Clerk's Office) readily accessible to the public and to ensure that notices posted remain posted through June 24, 2004, the deadline for comment on this remand.

On May 20-21, 2004, LBC Staff provided the materials listed below to each participating member of the Commission; the former Commission members who participated in the original Homer annexation proceeding; City; Homer City Clerk (15 copies); Homer Public Library (15 copies); each of the 14 respondents; and the respective legal counsel for: the City; Alaskan's [sic] Opposed to Annexation, et al; CCAA; and Abigail Fuller.

1. the complete record on appeal to the Superior Court in electronic format (Adobe Acrobat pdf on CD);
2. "Order on Appeal of Local Boundary Commission Decision," *Homer Remand Order*, 3 AN-02-0426 CI (Alaska, December 4, 2003), in electronic format (Adobe Acrobat pdf on CD); and
3. a printed copy of the *Order on Remand* (with attachments).

Timely comments were received from the following:

1. Milli Martin;
2. Gary J. Peterson;
3. Jim Reinhart;
4. Phil and Tammy Clay;
5. Linda Reinhart;
6. Abigail Fuller;
7. Michael Ryan;
8. CCAA;
9. Sharon Bouman;
10. Pete Roberts;
11. Dave and Eileen Becker;
12. Doris Cabana;
13. AOA;¹¹
14. Roberta Highland and Robert Archibald;
15. Kevin Waring;
16. City;
17. KPB; and
18. Vi Jerrell, Ph.D.

LBC Staff promptly posted a copy of all written comments on the Homer Remand Web site. On June 25, 2004, LBC Staff sent a copy of the written comments to the Homer City Clerk; legal counsel for: the City; AOA; CCAA; and Abigail Fuller. The comments are also available at the Homer City Library. As noted below, the comments were summarized in LBC Staff's remand preliminary report and furnished to the Commission.

¹¹Two sets of comments were submitted for AOA, one by Doris Cabana and the other by Vi Jerrell, Ph.D.

1 On July 12, 2004, the City filed comments in reply to the timely written
2 comments noted above. Upon receipt, the City's reply comments were posted to the
3 Commission's Web site. On July 19, 2004, a copy of the City's reply comments was
4 sent to the legal counsel for the City; AOA.; CCAA; and Abigail Fuller. Those reply
5 comments were also summarized in LBC Staff's remand preliminary report (discussed
6 below) and furnished to the Commission.
7

8 On August 12, 2004, LBC Staff distributed copies of its 204-page *Pre-*
9 *liminary Report on Remand*. Among other things, the *Preliminary Report on Remand*
10 recommended that the Commission affirm the December 26, 2001, Homer decision
11 granting annexation of 4.58 square miles to the City. Further, it recommended that the
12 Commission reject as unconstitutional and otherwise unlawful the new Court-imposed
13 standard that the effect of city annexation on existing or prospective borough service
14 areas must be considered in determining the best interests of the State.
15

16 The *Preliminary Report on Remand* was distributed to 35 interested indi-
17 viduals and parties including each participating member of the Commission; the City;
18 each of the 14 respondents; the former Commission members serving at the time an-
19 nexation was approved in 2002; and the respective legal counsel for the Commission;
20 the City; AOA; CCAA; and Abigail Fuller. The Homer City Clerk and the Homer Library
21 were each provided 15 copies of the *Preliminary Report on Remand* for use by the
22 public. On that same date, the *Preliminary Report on Remand* was posted on the
23 Commission's Web site.
24

25 The Commission's *Order on Remand, supra*, established September 2,
26 2004, as the deadline for submitting written comment on the *Preliminary Report on*
27 *Remand*. Ten sets of comments were filed by that established deadline. Comments
28 were filed by
29

- 30 1. AOA, by Vi Jerrell, Ph.D.;
- 31 2. AOA, by Doris Cabana;
- 32 3. Vi Jerrell, Ph.D.;
- 33 4. Doris Cabana;
- 34 5. CCAA (8/26/04);
6. CCAA (9/1/04);
7. Abigail Fuller;

8. City;
9. John McLay; and
10. Allen Tesche.

The comments were posted on the Commission's Web site, *supra*. The comments were summarized in LBC Staff's *Final Report on Remand (infra)*. A copy of the comments was also provided to each member of the Commission.

The Commission met in public meeting on September 1, 2004, at which time it determined that the public hearing in this matter would be held in Homer on November 20, 2004. Notice¹² and the agenda of the public meeting was sent to the City; each respondent; the respective legal counsel for: the Commission, City, AOA, CCAA, and Abigail Fuller; and the former Commission members who participated in the original Homer annexation proceeding. Notice of the public meeting was published in the *Anchorage Daily News* on August 22, 2004.

On September 2, 2004, LBC Staff distributed its 75-page *Final Report on Remand*. LBC Staff reaffirmed the recommendations set out in its *Preliminary Report on Remand* that (1) the Commission discuss the effect of annexation on KESA and the limitations in Alaska's Constitution and Statutes on the creation of new service areas; and (2) the Commission reject as unconstitutional and otherwise unlawful the new Court-imposed standard that the effect of city annexation on existing or prospective borough service areas must be considered in determining the best interest of the State.

The *Final Report on Remand* also provided guidelines for commenting at the Commission's November 20 public hearing in Homer and reminded participants that the hearing would be conducted in accordance with the procedures established in the *Order on Remand*. It also restated provisions of the *Order on Remand* regarding the convening of a decisional session following the hearing and included a copy of the laws governing decisional sessions.

LBC Staff distributed copies of the *Final Report on Remand* to each participating member of the Commission; the City; each of the respondents; the

¹²The notice of the public meeting was also sent to numerous State officials and others who may have had an interest in items on the agenda. It was also distributed electronically to the persons subscribing to the LBC's e-Notice list.

1 respective legal counsel for: the Commission, City, AOA, CCAA, and Abigail Fuller;
2 and the former Commission members who participated in the original Homer
3 annexation proceeding. LBC Staff also provided 15 copies each to the Homer Public
4 Library and the Homer City Clerk. The *Final Report on Remand* was also posted to
5 the Commission's Web site, *supra*.

6
7 On October 11, 2004, LBC Staff issued notice of the Commission's No-
8 vember 20 public hearing. It arranged for the notice to be published in the *Homer*
9 *News* on October 14, 21, and 28, 2004; and in the *Peninsula Clarion* on October 27,
10 24, and 31, 2004. In addition, LBC Staff arranged for notice of the hearing to be
11 posted on the State's *Online Public Notice System* beginning October 11, 2004, and
12 continuing through the date of the hearing. The notice also set the time and place for
13 the hearing in Homer: 10 a.m., November 20, 2004, in the City Council Chambers in
14 Homer.¹³

15
16 On October 11, 2004, LBC Staff requested KBBI-AM; KDLL-FM; KGTL-
17 AM; KKIS-FM; KPEN-FM; KSLD-AM; KSRM-AM; KWHQ-FM; KWVV-FM; and KXBA-
18 FM to broadcast a PSA of the hearing from October 30 - November 19, 2004. The no-
19 tice of the hearing was also served on the City; each respondent; the respective legal
20 counsel for: the Commission, City, AOA, CCAA, and Abigail Fuller; and the former
21 Commission members who participated in the original Homer annexation proceeding.
22 Further, in accordance with the *Order on Remand*, the Homer City Clerk was furnished
23 copies of the public hearing notice to post in at least three prominent locations for at
24 least 21 days preceding the date of the hearing.¹⁴

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27
28 ¹³LBC Staff contacted numerous other sites when attempting to find a suitable location for the
29 hearing. When studying site locations, Staff considered capacity requirements, necessary accommoda-
30 tions for a public hearing (tables, chairs, court reporter setup; sound system; teleconference availability),
31 and suitable acoustics to assure an adequate recording of the hearing. Staff first contacted the Homer
32 High School to inquire about use of the Mariner Theater, the site of the LBC's hearing on the City's an-
33 nexation proposal on December 14-15, 2001. The Theater was unavailable. Staff then contacted the
34 Alaska Islands and Oceans Visitors Center, Kachemak Bay Campus of the University of Alaska Anchorage, and Homer Library, all of which were unavailable for various reasons. Staff ultimately contacted the City to inquire about the layout, facilities, and availability of the City Council Chambers. Staff concluded that Council Chambers would reasonably accommodate the needs for the hearing, and, since the hearing was on a Saturday, the Chambers was available. Therefore, Staff reserved the Chambers for the hearing and identified the site in the October 11, 2004, public notice of the hearing.

¹⁴The Commission notes that the notice of the hearing was, and continues to be, posted on the City's Web site at <http://clerk.ci.homer.ak.us/Notice%20of%20Hearing.pdf>.

1 On November 8, 2004, LBC Staff received filings from Dr. Vi Jerrell, on
2 behalf of herself and AOA, objecting to the use of the City Council Chambers as the
3 location of the hearing and asking that the hearing location be moved or the hearing
4 rescheduled. Among other things, she asserted seating-capacity limitations, safety
5 issues, and location neutrality as reasons for her request. Dr. Jerrell also requested
6 changes to the method in which her name is displayed for service of documents in this
7 proceeding.
8

9 By letter dated November 9, 2004, LBC Staff notified Dr. Jerrell of the
10 efforts made in securing a suitable hearing location and assured her that the City's
11 employees would not be involved with the course or conduct of the hearing¹⁵ and that
12 the hearing would be fair to all parties. As to the issue of service, LBC Staff noted that
13 Dr. Jerrell has been served in several ways with all documents in this case.¹⁶
14

15 The Commission notes that Dr. Jerrell and Doris Cabana, for themselves
16 and on behalf of AOA, also filed documentation on November 8 and 9 that the Com-
17 mission is prohibited from considering under 3 AAC 110.500.

18 On November 12, 2004, Dr. Jerrell telephonically contacted LBC Staff
19 opposing the hearing location and offering a list of alternative locations, some of which
20 had previously been considered. Between November 12 and 16, 2004, LBC Staff
21 contacted the majority of the sites enumerated by Dr. Jerrell. They were either un-
22 available or unsuitable. In some cases, representatives of the facilities did not return
23 Staff's inquiry. Documentation detailing LBC Staff's efforts to find hearing-room facili-
24 ties was provided to the Commission.
25

26 The deadline for submitting witness lists was established by the Com-
27 mission *Order on Remand*. In that regard, *Section 6(e)* of that *Order* specified that a
28

29 ¹⁵LBC Staff arranged to pick up the key to the Chambers upon arriving in Homer Friday evening
30 and to open the Chambers on Saturday morning before the hearing. The Commission's contract court
31 reporter set up the facilities, recorded the hearing, and rearranged the facilities when the hearing was
32 concluded. LBC Staff returned the key to a designated City official before leaving Homer Saturday eve-
33 ning.

34 ¹⁶LBC Staff observed that Dr. Jerrell was served in her own name and through her affiliation
with AOA. AOA has been served by copy to Doris Cabana; both Dr. Jerrell and Ms. Cabana had been
individually served as respondents; and the attorney representing AOA and both Dr. Jerrell and
Ms. Cabana had been served, as well. AOA is a single respondent, regardless of the number of
entities' interest that it represents, and may have only one address for required service. AOA's copies
of remand documents were sent to Ms. Cabana's address as Dr. Jerrell had been out of town.

1 party intending to call witnesses to provide sworn testimony was required to submit a
2 list of such witnesses at least 14 days in advance of the hearing (3 AAC 110.550). In-
3 asmuch as the hearing was scheduled to commence November 20, 2004, witness lists
4 were required to be filed by November 6, 2004. No witness list was filed by that dead-
5 line.

6
7 On November 11, 2004, LBC Staff was contacted by the City requesting
8 an extension of the deadline by which to submit a witness list. As provided for under
9 3 AAC 110.660, a procedural regulation such as 3 AAC 110.550 may be relaxed or
10 suspended if strict adherence to the regulation would work injustice, result in a sub-
11 stantially uninformed decision, or not serve relevant constitutional principles and the
12 broad public interest.

13
14 On November 11, 2004, the Commission Chair determined that affording
15 all parties a brief extension of time by which to file lists of witnesses to testify at the
16 hearing could aid in a more informed decision and serve both constitutional principles
17 and the broad public interest. Accordingly, the deadline for a party to file a list of wit-
18 nesses for the November 20, 2004, hearing was extended to 9 a.m., Thursday, No-
19 vember 18, 2004. Each list was required to comply with the requirements of *Section*
20 *6(e)* of the Commission's *Order on Remand* regarding contents of such lists,¹⁷ but
21 service of the lists was required to be made by hand-delivery, overnight mail, facsimile,
22 or e-mail. That ruling was served on all parties and their respective counsel.

23
24 LBC Staff requested a PSA of the deadline extension to run from No-
25 vember 12, 2004, through November 18, 2004. The PSA request was sent to KBBI-
26 AM; KDLL-FM; KGTL-AM; KKIS-FM; KPEN-FM; KSLD-AM; KSRM-AM; KWHQ-FM;
27 KWVV-FM; and KXBA-FM.

28
29 Immediately prior to the hearing on November 20, 2004, three of the four
30 Commission members participating in this remand proceeding toured by car to inspect
31 the 4.58 square miles of annexed territory. Commissioner Zimmerle was unable to
32 travel to the hearing. She participated in the hearing by teleconference.

33
34 ¹⁷Those requirements provide: "The list must include the name and qualifications of each wit-
ness, the subjects about which each witness will testify, and the estimated time anticipated for the testi-
mony of each witness."

1 The Commission convened in public hearing on the annexation remand
2 at 10 a.m., November 20, 2004, in the City Council Chambers in Homer. Approxi-
3 mately twenty persons attended the hearing.

4 After introductory remarks, the Chair reported for the record that
5 members of the Commission had been contacted ex parte the previous night by
6 people from the community. He further noted that even though the contacts were
7 inappropriate and illegal, he concluded that the contacts had not unduly influenced the
8 Commission members. (Tr. 5.)

10 Under the segment of the agenda allowing for public comment on issues
11 not on the hearing agenda, Dr. Jerrell, on her own behalf and that of AOA, requested
12 that the hearing be rescheduled and relocated. She restated the objections she had
13 set out in writing and asserted that it was hers and the public's "perception that the lo-
14 cations have not been pursued to a full extent by LBC staff." (Tr. 6.) She also ques-
15 tioned whether information intended for Commission members is actually delivered by
16 Staff or whether they just get a summary. (Tr. 7.)

18 The Chair responded that the Commission members receive all informa-
19 tion except that which is submitted untimely (3 AAC 110.500). Further, the Chair
20 stated his belief that Staff goes overboard to see to it that all information that comes in
21 gets to the Commission. (Tr. 7.)

23 After referring to the information LBC Staff had provided regarding its
24 efforts in finding suitable hearing facilities,¹⁸ the Chair polled the other Commission
25 members as to the question of rescheduling and moving the hearing. None of the
26 Commissioners voted to grant Dr. Jerrell's request.

27 A question was also raised as to the sequence of testimony and com-
28 ments set out on the agenda. The Chair noted for the record that the Commission's
29 May 18, 2004, *Order on Remand* specified the procedures, including testimony and
30 comment schedule, to be followed at the hearing.

34 ¹⁸The Commission notes that CCAA stated that it had no problem with the hearing venue.
(Tr. 12.)

1 After the close of public comment, LBC Staff summarized its reports and
2 recommendations to the Commission concerning the Homer annexation remand.

3 The opening statement of the City followed that summary. The City's
4 opening statement was made by its attorney, Gordon Tans.

5 Opening statements by respondents in this proceeding were made by:
6 Eileen Becker, Vice Chairman of CCAA; Doris Cabana on her own behalf and that of
7 AOA; Dr. Jerrell on her own behalf and that of AOA; and Pete Roberts.¹⁹

8
9 Following the conclusion of opening statements, the City presented the
10 sworn testimony of one witness: Victor Fischer. CCAA presented the sworn testimony
11 of two witnesses: Peter Roberts and Lee Krumm. Respondent Doris Cabana pre-
12 sented sworn testimony on her own behalf.

13 The City called one witness to provide sworn responsive testimony: City
14 Manager Walt Wrede.

15
16 After the conclusion of sworn testimony, the hearing was opened for a
17 period of public comment. The following individuals presented comment during this
18 segment of the hearing: Doug Stark; Dr. Jerrell; John Fenske, Mike Yourkowski; and
19 Dennis Novak.

20 Following the close of public comment, Gordon Tans presented the City's
21 closing statement. Respondent CCAA's closing statement was presented by Eileen
22 Becker, its Vice President. Peter Roberts presented a closing statement on his own
23 behalf. Gordon Tans presented the City's reply statement.

24
25 At the conclusion of the City's reply, the hearing ended. The Chair polled
26 Commission members as to their desire to hold a decisional session at that time. The
27 Commission determined that a decisional session would be scheduled following re-
28 ceipt of the transcript of the hearing.

29 The Commission adjourned at 4:15 p.m.

30
31 On January 5, 2004, the Commission convened a public meeting. The
32 meeting was noticed to the public. Notice of the meeting was published in the
33

34 ¹⁹The Commission notes that respondent Abigail Fuller notified the Commission on Novem-
ber 5, 2004, that she would be unable to participate in the hearing but believed that CCAA would ade-
quately represent her interests.

1 *Anchorage Daily News* on December 17, 2004. The notice and agenda were served
2 on all parties in this proceeding, *supra*.²⁰ Item VIII on the agenda of that meeting was
3 a decisional session on the Homer annexation remand.

4 At the beginning of the decisional session, the Chair noted that a clarifi-
5 cation was needed for the record regarding the *ex parte* contacts discussed at the No-
6 vember 20, 2004, public hearing. The Chair stated that a request for disclosure of the
7 content of the *ex parte* contacts had been made by respondent Abigail Fuller.

8 The Chair stated that the contacts were telephone calls made to him and
9 Commissioner Robert Harcharek. The female caller expressed concern regarding use
10 of the City Council Chambers for the hearing because of safety concerns and inade-
11 quate seating capacity. The caller then proceeded to express opposition to the an-
12 nexation, at which point he advised the caller of the inappropriate nature of the
13 conversation and terminated the call. Commissioner Harcharek received two calls,
14 one from a female and the other from a male. The two calls to Commissioner Har-
15 charek were similar in content to the call made to the Chair.

16 Following that disclosure, the Commission discussed the issue on re-
17 mand and determined that the Commission's decision of December 26, 2001, should
18 be affirmed.

19 20 21 22 *SECTION II* 23 *FINDINGS AND CONCLUSIONS*

24 **A. In Its Original Decision, the Commission Gave Proper Consideration to** 25 **the Impact That Annexation Would Have on KESA.**

26 The Superior Court indicated in its remand order that it "finds the lack of
27 consideration given to the effect annexation would have on KESA troubling."
28 (*Kachemak Area Coalition v. City of Homer*, 3 AN-02-0426 CI (Alaska, December 4,
29 2003), p. 21.) The Court noted that "there is much mention of KESA within both the
30 [Department's] Preliminary and Final Reports as well as the whole record. However . .
31 . [t]here is no indication any discussion took place regarding the impact annexation
32

33
34 ²⁰Notice of the public meeting was also sent to numerous State officials and others who may
have had an interest in items on the agenda. It was also distributed electronically to the persons
subscribing to the LBC's e-Notice list.

1 would have on the remainder of KESA." (*Id.*, p. 20.) The Court concluded that, "a
2 discussion of the effect annexation would have on surrounding services [*sic*] areas,
3 was warranted to ensure that the annexation was indeed in the best interests of the
4 state. There is no evidence that any such discussion ever occurred. Thus a remand
5 is appropriate to ensure that the LBC considers this issue." (*Id.*, p. 22.)
6

7 As occurred in the Homer annexation, it is not uncommon for a new bor-
8 ough service area to be created or the powers of an existing borough service area to
9 be expanded in response to the prospect of a city annexation. The record in this re-
10 mand proceeding demonstrated that the Commission members who rendered the
11 original Homer decision were well aware of that circumstance. In fact, a majority of
12 those Commission members had faced issues involving borough service areas in
13 three city annexation proposals filed in the three years prior to the Homer annexation
14 proposal.
15

16 Those were the March 1997 petition by the City of Haines to annex
17 6.5 square miles, the February 1999 petition by the City of Ketchikan to annex
18 0.48 square miles, and the March 1999 petition by the City of Kodiak to annex
19 19.5 square miles. In the Haines case, annexation critics argued that borough service
20 areas are constitutionally preferred over (or on par with) city annexation. Victor
21 Fischer, one of the paramount experts in Alaska local government, particularly the Lo-
22 cal Government Article of Alaska's Constitution,²¹ advised the Commission in that pro-
23 ceeding as follows:
24
25
26

27 ²¹Mr. Fischer is recognized by the Alaska Supreme Court as "an authority on Alaska govern-
28 ment." (Keane v. Local Boundary Commission, 893 P.2d 1239, 1244 (Alaska 1995).) He received a
29 bachelor's degree from the University of Wisconsin in 1948 and a Master's Degree in Community Plan-
30 ning from the Massachusetts Institute of Technology in 1950. He has been involved in Alaska local gov-
31 ernment and local issues since 1950. Mr. Fischer was executive secretary of the League of Alaskan
32 Cities in the 1950s. He was elected as a delegate to the Alaska Constitutional Convention held in 1955-
33 1956. During the convention, Mr. Fischer served on both the Committee on Local Government and the
34 Style and Drafting Committee; he held the position of Committee Secretary on the former. In 1961 –
1962, Mr. Fischer received the Littauer Fellowship in public administration from Harvard University. Mr.
Fischer has held several planning-related positions in Alaska. He has written and co-authored a num-
ber of books and publications concerning state and local government in Alaska. These include *The*
State and Local Governmental System (1970), *Borough Government in Alaska* (1971), *Alaska's Con-*
stitutional Convention (1975), and *Alaska State Government and Politics* (1987). Mr. Fischer served in
Alaska's Territorial House of Representatives (1957-1959) and the Alaska State Senate (1981-1986).
He was a member of the faculty of the University of Alaska Fairbanks and of the University of Alaska
Anchorage. At the University, he was primarily associated with the Institute for Social and Economic
Research (ISER), where he was director for ten years. He is currently a professor of Public Affairs at
the University of Alaska with ISER.

1 The position that establishment of new service areas is the constitution-
2 ally preferred alternative to city annexation or on par with cities is com-
3 pletely wrong, it's nonsense. There is no basis whatsoever to support
4 that view. All provisions of Article X make it totally obvious that there are
5 two preferred types of local government units under Alaska's constitution:
cities and boroughs. Service areas are subsidiary units of boroughs.
Section 5 unequivocally establishes that annexation is a preferred alter-
native to creation of a new service area.

6 Victor Fischer, September 29, 1997, letter, pp. 1-2.

7 In its original decision regarding the Homer annexation, the Commission
8 clearly recognized the constitutional and statutory limitations with respect to estab-
9 lishment of new service areas versus city annexation. The Commission stated in this
10 respect:
11

12 Article X, § 5 of Alaska's Constitution and AS 29.35.450(b) place par-
13 ticular limitations on the creation of new service areas. Both express a
preference for city annexation over the creation of a new service area.

14 *Statement of Decision in the Matter of the March 20, 2000, Petition by the City of*
15 *Homer for Annexation of Approximately 25.64 Square Miles*, Local Boundary Commis-
16 sion, December 26, 2001, p. 28.

17 The Commission noted further:

18 The legal ability of the [KPB] to provide services to the territory pro-
19 posed for annexation is circumscribed by the provisions of Article X, § 5
20 of the Constitution of the State of Alaska and AS 29.35.450(b). Ac-
21 cordingly, no overriding significance is ascribed to the establishment of
22 the Kachemak Emergency Service Area with respect to the capability of
the Kenai Peninsula Borough to serve the territory proposed for an-
nexation.

23 *Id.*, p. 29.

24 The significance of those statements apparently escaped judicial attention.

25 The Chair of the LBC at the time of the original Homer decision, com-
26 mented in the course of this remand proceeding about the view of the Commission, as
27 it was then constituted, with regard to the need to consider the impact of annexation
28 on borough service areas.²²

30
31 ²²Kevin Waring was appointed to the Commission on July 15, 1996, and served as LBC Chair from July
32 10, 1997, until March 1, 2003. In addition to his service on the Commission, he has had a distinguished career in
33 other local and state governmental affairs in Alaska. He was the first director of the Division of Community Planning
34 in the former Alaska Department of Community and Regional Affairs (1973-1978), predecessor agency of the
Department. See n. 2 above. Between 1980 and the spring of 1998, he operated a planning/economics consulting
firm in Anchorage. From the spring of 1998 until early 2000, Mr. Waring was employed as manager of physical
planning for the Municipality of Anchorage's Community Planning and Development Department. He has since
returned to private consulting. Mr. Waring has been active on numerous Anchorage School District policy and
planning committees and boards of the Municipality of Anchorage.

1 No law or regulation requires the Commission to address the impacts of
2 annexation on a service area or remnant service area.

3 Review of relevant statutes and regulations indicates that this lack is
4 considered and purposeful, and reflects a consistent public policy pos-
5 ture on the relative status of city and borough municipalities and service
6 areas. It is noteworthy that:

7 1. The Alaska Constitution established a local boundary commis-
8 sion to consider any proposed local government (i.e., city or borough)
9 boundary change, but not service area boundary changes. Service area
10 boundary changes were not deemed a matter of statewide concern com-
11 parable to municipal boundary changes and were delegated to municipal
12 governments.

13 2. AS 29.06.040 establishes a statutory procedure for Commis-
14 sion consideration of municipal boundary changes. The legislature has
15 not adopted comparable statutory procedures governing service area
16 boundary changes.

17 3. AS 44.33.812(a)(2) requires the Commission to adopt regula-
18 tory standards and procedures for **municipal** annexation and detach-
19 ment. The legislature has not adopted comparable statutory requirement
20 for service area boundary changes.

21 4. 3 AAC 110 establishes regulatory standards for annexations to
22 cities and boroughs. The Commission has not adopted comparable
23 standards for annexations to service areas.

24 5. 3 AAC 110 establishes regulatory standards for detachments
25 from cities and boroughs. These standards authorize the Commission to
26 consider impacts on the remnant city (3 AAC 110.260(a)(2)) and the
27 remnant borough (3 AAC 110.260(a)(2)). The Commission has not
28 adopted comparable regulatory standards for detachments from service
29 areas or impacts on remnant service areas.

30 Clearly, the Alaska Constitution and the Alaska legislature, and the
31 Commission following their lead, have a heightened regard for munici-
32 palities compared to their service areas.

33 Kevin Waring, responsive comments, June 24, 2004, pp. 3 - 4.

34 Allan Tesche, who had served on the Commission at the time of the
original Homer annexation decision, commented in the course of the subsequent re-
mand proceeding that:

We who rendered the original Homer decision were well aware of the
constitutional and statutory preference for city annexation over creating a
new borough service area (we had dealt with that issue in the three prior
cases outlined in the preliminary report.)

Allan Tesche, comments, August 26, 2004, p. 1.

Moreover, Victor Fischer addressed this issue in testimony at the Com-
mission's November 20, 2004, public hearing in this remand proceeding. He stated:

1 The question of the negative effects of annexation on the limited service
2 area created by the borough is an interesting one that is really not -- sort
3 of not provided for in the constitution. And from my standpoint is not
4 particularly relevant. Because the presumption in the constitution is that
5 general government is preferred, city government over an urban area is
6 preferred. And the service area is not at the same level as city
7 government and borough government. And particularly when you have a
8 first class city and then you have a second class borough, and
9 underneath that you have a service area.

10 So from my standpoint . . . as I look at the constitution and the legal
11 requirements, the state interests under the constitution and under the
12 provisions of law is to promote general governments -- general local
13 governments, not special districts and special service areas.

14 In particular this annexation does not effect the integrity of the borough.
15 This is not an issue of one constitutional government versus another
16 constitutional local government and balancing the issues between them.
17 This is a constitutionally provided local government and the issues raised
18 deal with a subsidiary level that is not a general government.

19 Tr. 79 – 80 (emphasis added).

20 The framers of Alaska's Constitution mandated the establishment of the
21 LBC "to provide an objective administrative body to make state-level decisions re-
22 garding local boundary changes, thus avoiding the chance that a small, self-interested
23 group could stand in the way of boundary changes which were in the public interest."²³

24 The Alaska Supreme Court has held that:

25 The policy decision as to . . . annexation is an exercise of lawfully vested
26 administrative discretion which we will review only to determine if ad-
27 ministrative, legislative or constitutional mandates were disobeyed or if
28 the action constituted an abuse of discretion.

29 *Port Valdez* at 1151.

30 In another case involving the LBC, the Alaska Supreme Court stated:

31 Without doubt there are questions of public policy to be determined in
32 annexation proceedings which are beyond the province of the court. Ex-
33 amples are the desirability of annexation, as expressed in published
34 standards. Judicial techniques are not well adapted to resolving these
questions. In that sense, these may be described as political questions,
. . . beyond the compass of judicial review.

United States Smelting, Refining and Mining Company v. Local Boundary Commis-
sion, 489 P.2d 140, 143 (Alaska 1971), hereinafter referred to as "*Nome*" (emphasis
added).

²³*Port Valdez Co. v. City of Valdez*, 522 P.2d 1147, 1150 (Alaska 1974).

1 In this proceeding, the Court took the opposite approach. In its new
2 standard, the Court ignores the constitutional and statutory preference for annexation
3 over creation of service areas and rewrote the law to, in effect, supersede that prefer-
4 ence.

5 The Commission concludes from the foregoing that the LBC, as it was
6 constituted during the original annexation proceedings, gave proper consideration to
7 the impact that annexation would have on KESA in its original decision.
8

9 **B. Notwithstanding the LBC's Duty to Establish Annexation Standards,**
10 **the Court Created a New Standard in This Remand Proceeding. That New Stan-**
11 **dard Was Established Outside the Process Set Out in the Administrative Proce-**
12 **dure Act and Was Applied Retroactively.**

13 The Alaska Legislature has imposed a duty on the LBC to establish for-
14 mal standards for annexation.²⁴

15 One of the issues on appeal in the previously cited *Nome* case was the
16 absence of Commission regulations dealing with annexation despite the legislative
17 mandate for such. In view of that defect, the Court overturned the Commission's deci-
18 sion and stated:

19 We think it clear from the overall structure of [AS 44.33.812] that the du-
20 ties imposed upon the commission in subsection (a) are mandatory. . . .
21 We are of the further opinion that the language employed by the legisla-
22 ture made the exercise of the commission's discretion under
23 [AS 44.33.812(a)] conditioned upon the development of standards and
24 procedures for changing local boundary lines In short, we hold that
25 before the commission could have conducted any effective meetings, or
26 hearings, and prior to its submitting to the legislature a valid proposal
27 concerning the Nome annexation, it was obligated to . . . develop stan-
28 dards for changing local boundary lines.

29

30 . . . [U]nder Alaska's Constitution this court has the duty of insuring that
31 administrative action complies with the laws of Alaska. Absent known
32 standards governing the changing of local boundary lines, the legisla-
33 ture's ability to make rational decisions as to whether to approve or dis-
34 approve proposed local boundary changes of the commission is
seriously handicapped.

Nome at 141-142, 144.

The lack of Commission annexation standards was also at issue in the
Port Valdez case. The Court stated:

²⁴ AS 44.33.812(a)(2) states, "The Local Boundary Commission shall adopt regulations provid-
ing standards and procedures for municipal incorporation, annexation"

1 We see three purposes underlying the statutory requirement of annexa-
2 tion standards. First, such standards expose the basic decision-making
3 processes of the commission to public view and thus subject commission
4 action to broad corrective legislation. Second, the standards guide local
5 governments in making annexation decisions and in preparing proposals
for the commission. Frustration of these purposes cannot harm the op-
ponent of annexation. Third, annexation standards objectify the criteria of
decision-making and delineate the battleground for a public hearing. . . .

6 *Port Valdez* at 1155 - 1156 (footnotes omitted).

7 Following the decisions in the *Nome* and *Port Valdez* cases, the Com-
8 mission adopted annexation standards to fulfill the duty to do so that was imposed by
9 the Alaska Legislature. It applied those standards in considering the City's petition for
10 annexation in this proceeding.

11 In the Homer remand proceeding, the LBC was compelled by the Court
12 to consider a factor that the LBC had concluded was of "no overriding significance." In
13 doing so, the Court, in effect, created and imposed a new city annexation standard in
14 this particular proceeding. Such action constituted the substitution of the Superior
15 Court's judgment for that of the Commission. Here, the Superior Court seized the
16 Commission's authority and duty to define the proper criteria for judging the merits of
17 annexation proposals. As discussed more fully below, the Court's reliance on *Keane*
18 for remand of the service-area issue is misguided. The *Keane* remand dealt with the
19 Commission's failure to address an existing standard, properly established in law. In
20 this case, all standards were considered. The Court's mandate that the Commission
21 consider the affect of annexation on a new service area or a remnant service is not an
22 existing standard. It was introduced by the Court as a new standard.

23 By establishing a new standard in this case, the Superior Court defeated
24 the fundamental purposes identified by the Alaska Supreme Court in *Nome* and *Port*
25 *Valdez* for standards. In particular, the new standard imposed by the Court in this pro-
26 ceeding certainly never aided the legislature in reviewing the action taken by the
27 Commission. Neither did the new standard guide the City in making its decision to
28 pursue annexation. The new standard did not assist the City in preparing its proposal
29 for the LBC. Moreover, the new standard certainly did nothing to "objectify the criteria
30 of decision-making and delineate the battleground for a public hearing." The Commis-
31 sion notes that the time involved and the costs associated with this remand proceeding
32
33
34

1 have been significant for all participating parties and individuals, LBC Staff, and the
2 Commission.

3 Under long-established principles, deference should have been given to
4 the LBC's judgment in the original proceedings. See *Keane* at 1241; *Lake and Penin-*
5 *sula Borough v. Local Boundary Commission*, 885 P.2d 1059,1062 (Alaska 1994);
6 *Mobil Oil Corp. v. Local Boundary Commission*, 518 P.2d 92,97-8 (Alaska 1974).

8 The U.S. Supreme Court has stated that, "The responsibilities for as-
9 sessing the wisdom of . . . policy choices and resolving the struggle between compet-
10 ing views of the public interest [in this instance, annexation versus service area
11 creation] are not judicial ones: 'Our Constitution vests such responsibilities in the politi-
12 cal branches' [i.e., the executive (Commission) and the legislative (Legislature)]."²⁵

14 A 1981 decision by the Alaska Supreme Court dealt precisely with the is-
15 sue of the Court's role in a dispute stemming from city annexation. The case involved
16 the question of whether annexation to the City of Haines resulted in an increased mu-
17 nicipal tidelands entitlement from the State.²⁶ The Alaska Department of Natural Re-
18 sources (DNR) urged the Court to reject Haines' claim for the increased entitlement, in
19 large part, on public policy grounds. DNR was particularly concerned that if Haines
20 prevailed, it would "open the door to municipal speculation in the ownership of tide-
21 lands" through annexation (*Haines* at 1050). The City of Haines stressed that annexa-
22 tion was subject to approval by the LBC, which would apply standards (*Haines* at
23 1051). The Alaska Supreme Court balked at a policy-making role urged by DNR. It
24 noted that annexation decisions are rendered by the LBC and reviewed by the Legis-
25 lature (*Haines* at 1051, n. 18). The Court stated, "As to the public policy arguments,
26 they are better addressed to the legislature; that body has ample opportunity to con-
27 sider them . . . in its review of each municipal expansion"

32 ²⁵*Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837, 866 (1984).

33 ²⁶*Alaska Department of Natural Resources v. City of Haines*, 627 P.2d 1047. With regard to
34 service areas, however, the Legislature's actions are also constrained by Article X, section 5 of the
Alaska Constitution.

1 The Chair of the Commission at the time of the original Homer decision
2 offered the following insights regarding the directive imposed by the Court in this re-
3 mand proceeding:

4 [T]he legal premises underlying Judge Rindner's decision to remand are
5 unsettling in several respects. As best I can tell, the ruling that the
6 Commission **must** explicitly consider annexation impacts on a remnant
7 service area as part of its determination of the "best interests of the
8 state" has no constitutional, statutory, or regulatory foundation. Further,
9 it appears to run counter to a previous Alaska Supreme Court decision
10 requiring the Commission to ground its decisions on regulatory provi-
11 sions. This matters greatly on both counts.

12 First, Judge Rindner's ruling will have implications for many proposed
13 city annexations. City annexation proposals frequently impinge on adja-
14 cent service area boundaries. Recent examples include annexation pro-
15 posals by the cities of Ketchikan, Kodiak, and Haines.^[27]

16 Second, Judge Rindner's ruling that the Commission **must** consider a
17 factor that is not codified in law or regulation is inventive.^[28] It effectively
18 nullifies the protection that established standards afford to all parties in a
19 proceeding. It exposes the Commission and others to unforeseeable
20 second-guessing. If left unchallenged, it invites mischief in future city
21 annexation proceedings.

22 **Judge Rinder cites Keane v. Local Boundary Commission as a basis**
23 **for his remand. In Keane, the Alaska Supreme Court properly cited**
24 **the Commission's failure to satisfy a specific statutory provision**
25 **(AS 29.05.021(b)) in remanding the Pilot Point incorporation petition.**
26 **There is a critical distinction between Keane and the present case.**
27 **The Keane remand was based on the Commission's omission to ad-**
28 **dress a specific statutory requirement. No law or regulation requires**
29 **the Commission to address the impacts of annexation on a service**
30 **area or remnant service area.**

31 Review of relevant statutes and regulations indicates that this lack is
32 considered and purposeful, and reflects a consistent public policy pos-
33 ture on the relative status of city and borough municipalities and service
34 areas

. . . .

Clearly, the Alaska Constitution and the Alaska legislature, and the
Commission following their lead, have a heightened regard for munic-
ipalities compared to their service areas.

Judge Rindner's remand decision is problematic in light of two other
Alaska Supreme Court decisions.

. . . .

²⁷Footnote 3 in original. The Commission's decision statements in those cases offer a princi-
pled and consistent analysis of issues stemming from city annexation of service areas.

²⁸Footnote 4 in original. The Commission's **discretionary** authority to consider any facts it
deems relevant is not here in question. This discretionary authority is implied by AS 29.06.040 which
states that the commission **may** (not must) accept a proposed annexation that satisfies applicable
statutory and regulatory standards.

1 . . . Judge Rindner's ruling seemingly stands the Alaska Supreme
2 Court's ruling in U.S. Smelting on its head by requiring the commission
3 to address an extra-regulatory standard.^[29]

4 Also puzzling is why Judge Rindner applied "independent judgment"
5 rather than the "reasonable basis test" to the issue of whether the
6 Commission properly considered impacts on the KESA, especially
7 given his cite of and quotes from Mobil Oil Corp. . . .^[30]

8 Kevin Waring, responsive comments, June 24, 2004, pp. 2 - 4 (emphasis added).

9 Former LBC member Allan Tesche stated:

10 The written comments submitted in this remand proceeding by Kevin
11 Waring, (Chair of the Commission at the time of the original Homer
12 decision) eloquently and accurately reflect our thinking when we
13 rendered the original Homer decision. Those comments also offer
14 relevant concerns in terms of the appropriateness of the remand. I
15 concur fully with Mr. Waring.

16 Allan Tesche, comments, August 26, 2004, p. 1.

17 As observed by former Commissioner Waring, the Court erred when re-
18 lying on *Keane* for its remand in this case. *Keane* was remanded to the Commission
19 because of its reasonably perceived failure to address an existing incorporation stan-
20 dard. In this case, the issue on remand is not an existing standard; it is, in fact, a new
21 one created by the Court.

22 The Commission's Staff expressed concern in its report and recommen-
23 dations to the Commission regarding the *de facto* new standard created by the Court.

24 The Staff stated:

25 The imposed new standard created by the Court in its remand order is
26 strikingly inconsistent with the clear preference set out in Alaska's Con-
27 stitution and Statutes for city annexation over creation of a new borough
28 service area. Accordingly, it would be improper to apply that standard
29 here or in any future annexation proceeding.

30 That led the Commission's Staff to recommend, in part, that "the Com-
31 mission reject as unconstitutional and otherwise unlawful the new Court-imposed
32 standard that the effect of city annexation on existing or prospective borough service
33 areas must be considered in determining the best interest of the State." (*Final Report*
34 *on Remand*, p. 30.)

²⁹*United States Smelting, Refining and Mining Company v. Local Boundary Commission*,
489 P.2d 140 (Alaska 1971), hereinafter referred to as "*Nome*."

³⁰*Mobil Oil, supra*.

1 In his testimony before the LBC on November 20, 2004, Victor Fischer
2 concurred with the recommendation of the Commission's Staff:

3 I think it is very important to point out to the judiciary that the
4 Commission has followed a very rigid strict process of abiding by all the
5 statutes and all the regulations. And that the court should not step into
6 these issues and put its judgment ahead of that of the Commission on
7 interpretation on a particular policy issue that you have decided. And
8 therefore I would urge you to include all of the recommendations of the
9 Department in your final decision.

10 Tr. 80 – 81.

11 Even assuming, *arguendo*, that the imposed new standard complied with
12 the Alaska Constitution and Statutes, the Commission is obligated to adopt annexation
13 standards in regulation (AS 44.33.812(a)(2)). Adoption of such a standard by the
14 Commission would be subject to the regulation adoption provisions of the
15 Administrative Procedure Act (AS 44.62) (APA).

16 Should the Commission choose, at some future point, to adopt a stan-
17 dard dealing with the effect of a city annexation on a borough service area, it must be
18 crafted in a thoughtful manner to reflect a proper balance of all relevant interests.³¹
19 Adopting any such standard in accordance with the APA will allow public debate over
20 such a standard.

21 Another concern in this proceeding is that the Court applied its new
22 standard retroactively. The APA would prohibit the LBC from doing so itself. Specifi-
23 cally, AS 44.62.240 provides, "If a regulation adopted by an agency under this chapter
24 is primarily legislative, the regulation has prospective effect only."³²

25 Based on the foregoing, the LBC concludes that the Court mistakenly
26 relied on *Keane* as support for remanding the service-area issue and usurped the
27 Commission's authority and duty to establish annexation standards. If the LBC wishes
28 to consider the effect of annexation of a proposed or existing borough service area, it

31 It may be relevant to consider, for example, (1) the effects upon the city if annexation is de-
32 nied, (2) whether residents of the service area(s) in question are receiving city services without com-
33 mensurate support for those services, (3) the prospect that new service areas might be formed in the
34 territory in question, (4) constitutional principles of maximum local self-government with a minimum of
local government units, (5) when the service area(s) in question was (were) created in relation to filing of
the annexation proposal, (6) the quantity and quality of services provided by the borough through the
service area(s) in question, and (7) the reasonably anticipated need for additional services or improved
services than those available in the service area(s) in question.

³² Clearly, annexation standards adopted by the LBC are "primarily legislative" in nature.

1 will adopt a standard for such in accordance with the Administrative Procedure Act.
2 Doing so will allow public input on any proposed standard.

3
4 **C. The Effect of Annexation on KESA Was *De Minimis* and Did Not Render**
5 **the Annexation Inappropriate in Terms of the Best Interests of the State.**

6 The following reasonably summarizes arguments presented to the LBC
7 on both sides of the question regarding the impact of annexation on KESA.

- 8
9 ▪ Annexation had a negative effect on KESA because it reduced the size, population,
10 and tax base of the area remaining in KESA, but the cost of providing service to the
11 remnant KESA was not correspondingly reduced.
- 12
13 ▪ Assertions were made that the annexed area removed one-fourth of the tax base
14 from KESA but only 2 percent of the area to be served. Others contend that the
15 annexed area took away 20 percent of KESA's area and one-third of the tax base.
- 16
17 ▪ Annexation will affect the potential for recruiting volunteers, board members, and
18 community work parties due to the loss in population residing in the reduced area
19 of KESA.
- 20
21 ▪ Annexation does not affect KESA's responsibility to provide service in the remnant
22 area, but it does remove some of the ability to provide needed services and pur-
23 chase equipment because of the loss of tax base.
- 24
25 ▪ Annexation thwarts the self-help efforts of the remnant area by removing as much
26 of the tax base as possible from KESA.
- 27
28 ▪ Annexation and the loss of revenue from the annexed area affect long-range plan-
29 ning, and growth of the KESA will be slowed, causing harm to those the KESA
30 serves. The loss of revenue decreases KESA's ability to borrow money or have
31 capital funds for grant matches.
- 32
33 ▪ Annexation is not in the best interests of the State.
- 34
▪ The City and the Commission cherry-picked the best part of KESA.

- 1 ▪ Annexation results in lost tax revenues of approximately \$114,593 per year to
2 KESA that may be partially offset by a potential reduction in the contract price.
3 However, the City is increasing its fire department budget, so the contract cost to
4 KESA may not drop.
- 6 ▪ Neither the Borough nor KESA opposed the annexation.
- 8 ▪ KESA's tax base is ample to support a viable service area. While the tax base was
9 reduced after annexation from \$216 million to \$177 million, KESA still retained an
10 adequate tax base to provide services to the remaining service area.
- 12 ▪ In addition, the reduced tax base of \$177 million was higher than three other com-
13 parable emergency service areas within the KPB.
- 15 ▪ Even if KESA were affected by annexation, KPB has viable alternatives to negate
16 the effect: It could adjust the boundaries of the service area (making them larger to
17 increase the tax base, or smaller to reduce the immense size of the area needing
18 service); provide a reduced level of service commensurate with the revenue
19 stream, or increase the tax rate (which had been arbitrarily capped by the borough
20 and voters at 1.75 mills).
- 22 ▪ The State has an interest in wildfire suppression and taking money away from
23 KESA through annexation could lead to inadequate wildfire suppression costing the
24 State millions of dollars. It is in the best interests of the State to have KESA use
25 state and federal funding to provide service to under-served rural areas farther
26 from the City.
- 28 ▪ Annexation is in the best interests of the State.
- 30 ▪ Annexation, not a local emergency service area, better serves the overall best in-
31 terest of the residents, the City, and the State. Initial inclusion within KESA of the
32 4.58 square miles and 900 residents in the area approved for annexation was an
33 unwise choice from the start. Those residents and properties are part of the Homer
34

1 community and in clear need of a full range of city services and should never have
2 been included in KESA. The LBC approved annexation for this area because it was
3 already part of the Homer community, it was contiguous and close to Homer, it was
4 the most in need of city services, and it was having the greatest impact on Homer.
5 In short, it best met the standards for annexation. It is precisely because it is more
6 densely populated and developed that it is more suitable for annexation.

7
8 ■ When annexation is warranted, as in this case, one cannot escape the fact that the
9 tax assessed valuation of any surrounding service areas will be decreased when
10 property is mixed into a city. Because a city is the preferred service provider over
11 proliferating limited service areas, the best interests of the State are served by an-
12 nexation. When annexation does occur, the adjacent service areas must adjust
13 accordingly. That might require a borough to adjust its service area budget, tax
14 rates, boundaries, levels of service, or otherwise. The Borough and the KESA vot-
15 ers are clearly capable of doing any or all of these things. To have to consider such
16 adjustments is simply an ordinary effect of changing demographics that led to the
17 necessity of annexing some of the Borough territory to Homer. Those ordinary ef-
18 fects certainly do not override the State's best interest or justify denying a well-
19 founded annexation that is otherwise overdue.

22
23 ■ The Commission and the City did not cherry-pick KESA. The area was approved
24 for annexation because it met the standards for annexation. The question should
25 be raised as to why the Borough "cherry-picked" the Nikiski Fire Service area (with
26 a 2002 tax base of \$1.2. billion) from the rest of the Borough's fire service areas.
27 Other parts of the Borough also need fire services; and if the Borough had chosen
28 to provide nonareawide fire services to all non-city Borough residents, then the
29 residents of KESA could also benefit from the lucrative Nikiski tax base.

30
31 ■ The Borough has tremendous resources to fund service areas, and the KPB As-
32 sembly can exercise control over the boundaries of its service areas to make them
33 work. The Borough has great flexibility to create or modify service areas as needed
34

- 1 to make the provision of fire and emergency services available to all on an equita-
2 ble basis.
- 3
- 4 ▪ A rural fire department does need different equipment than a fire department that
5 serves more densely populated and urbanized areas. Annexation of the more
6 populated areas near Homer will enhance the mission of KESA by allowing it to fo-
7 cus more on the rural, harder-to-reach areas through equipment choices and sta-
8 tion locations. The State's best interests are served when the City annexes and
9 serves areas near it where it can promptly respond, while KESA attends to under-
10 served areas farther away not as easily served by the City.
- 11
- 12 ▪ KPB Mayor's comments express views of his administration and the KESA Board,
13 but not the KPB Assembly. While the Mayor asserts that KESA tax base is re-
14 duced but costs are not significantly reduced, he does not state that KESA will be
15 unable to continue to provide services. He does not say that KESA cannot make
16 adjustments or find other sources of revenue. KESA has numerous options, in-
17 cluding raising the millage rate if the mill rate is insufficient to provide adequate
18 service to the huge service area. Homer's annexation involves a great deal more
19 than fire and emergency services. People in the outlying area do have a great
20 need for fire and emergency services that can be met by KESA, but those who live
21 closest to Homer have a much greater impact on the City and have a need for
22 many more of its services. The interests of the people and of the State are best
23 met when those who have the greatest impact on the City and need the widest va-
24 riety of services are annexed into the City. Because KESA can never perform the
25 functions of city government, it must yield to annexation in this case.
- 26
- 27
- 28
- 29 ▪ The Borough can exercise options as needed to keep KESA adequately funded
30 and operational.
- 31
- 32 ▪ The City does not oppose better services to the distant area; but it does oppose the
33 effort to deny the City jurisdiction over areas that should be in its boundaries so
34

- 1 that tax revenues can be diverted from the City to KESA to fund those distant
2 services.
- 3
- 4 ■ The Court's directive to the LBC to consider the effects of annexation on KESA
5 means that the LBC must also consider the converse; i.e., What is the effect on the
6 City of maintaining KESA's original boundaries? That question has essentially been
7 answered by the Commission's decision to allow annexation of the territory be-
8 cause of its impact on the City and how there will continue to be serious impacts if
9 it were not so annexed. The effects of KESA on the City are more varied and con-
10 siderably more profound than the effects of the City's annexation on KESA. When
11 added to the balanced best interests, the effects of non-annexation on the City
12 show that the annexation is definitely in the best interests of the people, the City,
13 and the State.
- 14
- 15
- 16 ■ The City agrees that fighting wildfires is the State's responsibility; if there is a
17 shortfall in revenues or equipment to fight such, then the State should increase its
18 funding for wildfire preparedness. The City should not have to lose tax revenues in
19 order to finance KESA's efforts to fight wildfires that are ultimately a State respon-
20 sibility. Taking funds from the City and giving them to KESA for the State's benefit
21 not only impedes the City's own financial ability to fight wildfires but also financially
22 weakens the City overall. While helping the Division of Forestry's fire fighting
23 budget, it results in a weakened and financially strapped city that is not in the best
24 interest of the State.
- 25
- 26

27 A fundamental issue in this proceeding is the allegation that the City and
28 the LBC "cherry picked" the 4.58 square miles annexed to the City. The foundation for
29 that allegation lies in the fact that the 4.58-square-mile territory is more densely popu-
30 lated and has a greater per-capita tax base compared to the remainder of KESA.

31 Those who derisively portray the annexation as "cherry picking" are pre-
32 sumably unfamiliar with the "limitation-of-community doctrine." (*See Mobil Oil, supra.*)
33 The doctrine restricts the jurisdictional boundaries of city governments to more urban
34

1 and developed territories. On average, the boundaries of city governments in Alaska
2 encompass only about 27 square miles.

3 The limitation-of-community doctrine is a foundation upon which the legal
4 standards for city annexation have been developed. For those familiar with the doc-
5 trine, it should come as no surprise that application of the annexation standards by the
6 LBC resulted in annexation of only the 4.58-square-mile portion of the KESA's
7 218.95 square miles. Given the limitation-of-community doctrine, it is not at all re-
8 markable that the 4.58-square-mile annexed territory is more densely inhabited and
9 has a higher per-capita tax base compared to the 214.37-square mile remnant area of
10 KESA.
11

12 The allegation of "cherry-picking" KESA and the Court's reliance on that
13 argument in its remand decision is baseless. Assuming for the sake of argument that
14 "cherry-picking" could be at issue in an annexation proceeding, in this case the very
15 history of the City's annexation effort vis-à-vis the creation of KESA militates against
16 such claim. There was no KESA to cherry-pick when the City began its annexation ef-
17 fort. The City's formal consideration of annexing the territory formally began on De-
18 cember 13, 1999; the Petition was submitted March 20, 2000; accepted for filing by the
19 Department on March 29, 2000; and public notice thereof issued April 3, 2000. All
20 these events predated the establishment of KESA. The first signature on a petition to
21 create KESA was dated April 12, 2000. Following the election regarding that creation,
22 the KPB approved the formation on August 15, 2000. By that time, the City's annexa-
23 tion efforts were nine months old.
24

25 It was the Commission's decision, and the Legislature's approval thereof,
26 that narrowed the size of the territory being annexed. That decision was based on the
27 strictures of Alaska's Constitution and Statutes and application of the Commission's
28 14 annexation standards, which are law and adopted under mandate from the Alaska
29 Legislature and the Alaska Supreme Court.
30

31 Applying the law (i.e., the annexation standards) to the City's Petition, the
32 Commission determined that the State's best interest was served by approving only
33 about one-fifth of the territory requested by the Petitioner. The Legislature tacitly
34

1 approved that determination. As long as a Commission decision has a reasonable
2 basis of support for the LBC's reading of the standards and its evaluation of the
3 evidence, the decision should be affirmed by the Court.³³

4 The Chair of the LBC at the time of the original Homer decision offered
5 the following comments concerning the basis for the Commission's conclusion that an-
6 nexation of the 4.58 square miles in question was in the best interests of the state.

8 Facts in record at the time of the original decision gave the Commission
9 ample reasons, had it thought reasons were needed, to conclude that
10 the annexation was in the best interests of the state regardless of im-
11 pacts on the remnant KESA.

11 Among other facts in the original record:

- 12 1. The Commission found there was a need for city services in
13 the annexed territory.
- 14 2. The Commission found that without the annexation, "both the
15 City and the area approved for annexation could be negatively
16 affected because, absent planning, development detrimental to
17 both areas will occur."
- 18 3. The Commission found that the City of Homer was best able to
19 provide needed services to the annexed territory.
- 20 4. The population in the City of Homer and in the annexed terri-
21 tory greatly exceeded the population of the remnant KESA.
- 22 5. The Alaska Constitution elevates general purpose municipal
23 governments over service areas. Boroughs may not establish
24 new service areas where the new service can be provided by
25 an existing service area, by incorporation as a city, or by an-
26 nexation to a city. Service areas are subordinate to the mu-
27 nicipalities that establish them. Service areas lack
28 autonomous authority to levy taxes, charges, or assessments.
- 29 6. The City of Homer was a general purpose city municipality with
30 a long history of providing a variety of city services. The KESA
31 was a recently formed limited purpose service area.
- 32 7. Since its inception, the KESA contracted with the City of
33 Homer to deliver fire and emergency services to the service
34 area. The KESA did not develop an operational capacity to
deliver its services.
8. After annexation as before, the KESA would have several
practicable options for delivery of its services.^[34]
9. The Kenai Peninsula Borough, the municipality responsible for
the KESA's creation and ultimately responsible for its financial
condition, concurred in the transition plan, without claim that
the annexation would impair the viability of the remnant KESA.

31 In sum, the original record supports a determination that the benefits of
32 annexation to residents of the City of Homer and the annexed territory

33 ³³*Mobil Oil* at 98; *Keane* at 1241.

34 ³⁴Footnote 1 in original. In fact, I believe the KESA has continued its pre-annexation arrange-
ment to contract with the City of Homer for actual delivery of services.

1 outweighed any adverse impacts on the remnant KESA, and that an-
2 nexation is in "the best interests of the state" as required by
3 AS 29.06.040(a) and 3 AAC 110.135, and as further specified in 3 AAC
4 110.980. I urge the Commission to affirm its earlier decision to approve
5 the annexation.^[35]

6 Kevin Waring, responsive comments, June 24, 2004, pp. 1 - 2.

7 Notwithstanding concerns regarding the Court's remand of this matter to
8 the LBC, the Commission has fairly examined the impact of annexation on KESA.

9 Before annexation, the population density of KESA was nearly
10 23 residents per square mile. The population density of the post-annexation bounda-
11 ries of KESA dropped to 19.3 residents per square mile. While it declined by roughly
12 16 percent, as shown in Table 1, KESA's post-annexation population density was
13 comparable to two of the Borough's other five emergency service areas (Anchor Point
14 Fire and EMS and Central Emergency Services). Moreover, KESA's population den-
15 sity was significantly greater than two of the Borough's other five fire or emergency
16 service areas (Central Emergency Medical Service Area and Nikiski Fire).

TABLE 1 2002 POPULATION DENSITIES OF KPB EMERGENCY AND FIRE SERVICE AREAS			
SERVICE AREA	2002 POPULATION	SIZE (SQUARE MILES)	POPULATION PER SQ. MILE
Bear Creek Fire	1,801	14.95	120.47
KESA (before annexation)	5,032	218.95	22.98
Anchor Point Fire and EMS	2,524	127.98	19.72
Central Emergency Services	17,478	886.35	19.72
KESA (after annexation)	4,134	214.37	19.28
Central Emergency Medical Service Area	2,309	1,232.47	1.87
Nikiski Fire	5,712	5,479.81	1.04

25 Concerns were expressed in the course of this remand that the removal
26 of 898 residents from KESA as a result of annexation adversely affects the potential
27 pool of KESA volunteers, board members, and other supporters of KESA's functions.
28 Notwithstanding the loss of residents, as shown in Table 1, post-annexation KESA still
29 had a substantially greater population in 2002 than did the Anchor Point Fire and EMS
30 Service Area, the Central Emergency Medical Service Area, and the Bear Creek
31 Service Area.

32
33
34 ³⁵Footnote 2 in original. In my mind, the legality of the KESA was not an issue. At the time the
Commission heard the petition, the KESA's formation was unchallenged and its *de facto* existence
perhaps unchallengable.

The taxable value within KESA was \$238,585,300 as of January 1, 2002. On a per-capita basis, that amounted to approximately \$47,414 per resident. After annexation, the value of taxable property in KESA dropped to \$177,162,069. The smaller territory was inhabited by 4,134 residents. The per-capita property tax base in the post-annexation KESA was approximately \$42,855 per resident.

Annexation reduced the per-capita property tax base within KESA by 9.6 percent. Comparisons to all other service areas in the KPB for fire and emergency medical services in 2002 are provided in Table 2.

TABLE 2 2002 PER-CAPITA TAX BASE OF KPB EMERGENCY AND FIRE SERVICE AREAS			
SERVICE AREA	2002 POPULATION	ASSESSED VALUE (2002)	TAXABLE VALUE PER RESIDENT
Nikiski Fire	5,712	\$1,286,557,871	\$225,237.72
Central Emergency Services	17,478	\$1,043,970,293	\$59,730.54
Central Emergency Medical Service Area	2,309	\$137,770,239	\$59,666.63
Anchor Point Fire and EMS	2,524	\$128,878,208	\$51,061.10
KESA (before annexation)	5,032	\$238,585,300	\$47,413.61
Bear Creek Fire	1,801	\$83,142,052	\$46,164.38
KESA (after annexation)	4,134	\$177,162,069	\$42,854.88

While annexation moved KESA's ranking among the six service areas listed in Table 2 from fifth to sixth, the reduction in the per-capita tax base was *de minimis*.

Moreover, it is noteworthy that the Mayor of the Kenai Peninsula Borough had reported to the Borough Assembly following certification of the petition to create KESA, that the proposed service area had a taxable value (based on prior year data) of \$199,193,000 and a population of 10,539. (See memorandum from Dale Bagley, Borough Mayor, May 25, 2000, p. 2.) The per-capita tax base reflected in those figures amounted to only \$18,900.56. The per-capita value of taxable property in KESA following the Homer annexation is more than twice the per-capita figure put before the Assembly following certification of the petition to form the service area.

Another useful measure of financial capacity is the assessed value per square mile. Before annexation, each of the 218.95 square miles within KESA held, on average, \$1,089,679 in taxable property. After annexation, that figure dropped by 24 percent to \$826,429 per square mile.

Even after annexation, however, the figure for KESA was substantially greater than the comparable measure for two of the five other service areas. The comparisons are shown in Table 3.

TABLE 3 2002 TAX BASE OF KPB EMERGENCY AND FIRE SERVICE AREAS (PER SQUARE MILE)			
SERVICE AREA	ASSESSED VALUE (2002)	SIZE (SQUARE MILES)	TAXABLE VALUE PER SQ. MILE
Bear Creek Fire	\$83,142,052	14.95	\$5,561,341.27
Central Emergency Services	\$1,043,970,293	886.35	\$1,177,829.73
KESA (before annexation)	\$238,585,300	218.95	\$1,089,679.38
Anchor Point Fire and EMS	\$128,878,208	127.98	\$1,007,010.85
KESA (after annexation)	\$177,162,069	214.37	\$826,428.68
Nikiski Fire	\$1,286,557,871	5,479.81	\$234,781.62
Central Emergency Medical Service Area	\$137,770,239	1,232.47	\$111,783.56

The LBC considers population density, per-capita property-tax figures, and valuation density to be fundamental measures of the viability of providing municipal services in this case. While those measures declined for KESA following annexation to the City, the post-annexation figures for KESA are comparable or, in some cases, more favorable when compared to other KPB service areas. Moreover, while annexation reduced KESA's size, population, and tax base, it also reduced the size, population, and tax base that KESA serves.

Obviously, KESA has continued to operate over multiple budget cycles following annexation of the 4.58 square miles to the City. Even the Court seems to recognize that KESA remains viable based on the conclusion at page 20 of the remand order where it states, "KESA was created and will continue to exist even if Homer annexes a portion of it." Thus, the Commission concludes that KESA has remained viable following annexation of territory to the City.

During the November 20, 2004, hearing, Victor Fischer testified as follows:

Looking at . . . and reviewing the Department's preliminary and final reports, including the various commentaries, I see nothing that would in any way justify that the annexation be set aside. Even considering the negative effects on the Kachemak Emergency Service Area, it still would not justify overturning the annexation. And certainly overturning the annexation would go counter to the basic stated constitutional and statutory preference for city and local government.

Tr. 80.

1 In that regard, the Commission observes that among the several reasons
2 annexation to the City was approved was the effect of the annexed territory on the
3 City. One example of the impact that the annexed territory had on the City is memori-
4 alized in the agreements between the KPB and the City for provision of fire and emer-
5 gency medical services in KESA. The first agreement is dated July 9, 2001. Of
6 particular importance are statements to the effect that:

7 Whereas, prior to July 1, 2001, the City of Homer provided and funded
8 all fire and emergency medical services to the area included in KESA
9 for approximately ten years, before which the City of Homer was the
primary funding source for the Homer Volunteer Fire Department
("HVFD") and paid all HVFD's administrative expenses, . . .

10 KPB/Homer, *Agreement for Provisions of Fire and Emergency Medical Services*,
11 July 9, 2003.

12 The Commission believes that setting aside the annexation, which is the
13 effect of not affirming the Commission's December 26, 2001, decision, is indeed
14 "counter to the basic stated constitutional and statutory preference for city and local
15 government." (Tr. 80.)

16 Based on the foregoing, the LBC concludes that the effect on KESA of
17 the 4.58-square mile annexation to the City of Homer was *de minimis*.
18

19
20 **SECTION III**
ORDER OF THE COMMISSION

21 For the reasons set out herein, the LBC reaffirms the December 26,
22 2001, conclusion of the LBC that annexation of the 4.58 square miles to the City of
23 Homer was in the best interests of the state and that all other applicable standards for
24 annexation were satisfied.
25

26 Approved in writing this 4th day of February, 2005.

27
28 **LOCAL BOUNDARY COMMISSION**
(Commissioner Bob Hicks, not participating.)

29
30 

31 By: Darroll Hargraves, Chairman

32
33 Attest:

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Dan Bockhorst, LBC Staff

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RECONSIDERATION BY THE COMMISSION

Within eighteen days after this decision becomes final under 3 AAC 110.570(g), a person may file a request for reconsideration of the decision. The request must describe in detail the facts and analyses that support the request for reconsideration. If the Commission has taken no action on a request for reconsideration within thirty days after the decision became final under 3 AAC 110.570(g), the request is automatically denied.

If the Commission grants a request for reconsideration, a party opposing the reconsideration will be allotted ten days from the date the request for reconsideration is granted to file a responsive brief describing in detail the facts and analyses that support or oppose the request for reconsideration.

JUDICIAL APPEAL

A judicial appeal of this decision may also be made under the Alaska Rules of Appellate Procedure, Rule 601, *et seq.* An appeal to the Superior Court must be made within thirty days after the last day on which reconsideration can be ordered.